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91-1155

No. _____

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In The Supreme Court
of the
United States

October Term, 1991

JO A. SMITH, Individually, and as Administratrix of the Estate of David Allen Smith, and JIMMIE A. SMITH, and KATHLEEN A. AYERS, Individually and as Administratrix of the Estate of KELLY JEAN LASKE

Petitioner

v.

THE UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Foy R. Devine
Counsel of Record
Attorney for Smith
Foy R. Devine, P.C.
2931 Piedmont Road
Atlanta, GA 30305
(404) 233-4141

Dennis N. Powers
Attorney for Ayers
Powers, Hallowell,
Burns and Nickolai
2254 E. Highland
Highland, MI 48031
313/887-8333

Attorneys for Petitioners

QUESTIONS PRESENTED FOR REVIEW

1.

Whether the United States may be held liable under the Federal Tort Claims Act for the negligence of the Federal Aviation Administration in re-certifying, on three different ocassions after revocation, mechanic John W. Stroupe, and in failing to revoke immediately his mechanic's certificate on August 3, 1987, as required by its own internal compliance order, thereby giving Stroupe the power to return aircraft to service as airworthy, where the FAA had actual knowledge of the mechanic's gross incompetence and repeated fraud and falsification of records.

2.

Whether the Court of Appeals for the Eleventh Circuit has sanctioned such a gross departure from the accepted and usual course of judicial proceedings so as to

merit reversal, when it affirmed a grant of a motion to dismiss for failure to state a claim before any record had been developed in this case.

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Jurisdictional Statement

The judgment and opinion sought to be reviewed was rendered by the Court of Appeals for the Eleventh Circuit on August 15, 1991, wherein the September 28, 1990 Order of the U.S. District Court for the Northern District of Georgia, dismissing plaintiff's action, was affirmed, without opinion. Jurisdiction vested in the District Court pursuant to 28 U.S.C. § 1346(b). A Motion for Rehearing and Rehearing in banc to the Court of Appeals for the Eleventh Circuit was denied on October 17, 1991.

Jurisdiction to review the decision of the Court of Appeals for the Eleventh Circuit by Writ of Certiorari is conferred upon this Court pursuant to 28 U.S.C. § 1254(1). This petition for Writ of Certiorari is filed within 90 days of the denial of the Motion for Rehearing and Rehearing in banc by the Court of Appeals for the Eleventh Circuit, pursuant to 28 U.S.C. § 2101(c) and Rule 13.4 of the Rules of the Supreme Court of the United States.

Statement of the Case

1. Material Facts

Petitioners are the parents and personal representatives of two individuals who were killed in the crash of a Piper Cherokee Six aircraft as the result of the gross negligence of the Federal Aviation Administration (FAA) in re-certifying, not once but three times, a mechanic known by the FAA to be dishonest, untrustworthy, and grossly incompetent.

On December 6, 1987, the Piper Cherokee Six aircraft, bearing federal registration number N5587J, crashed near LaGrange, Georgia due to an engine malfunction which caused the plane to stall and crash into a highway overpass, killing all four people on board, including petitioners' decedents. Shortly before the crash, the plane's engine was overhauled and certified as "airworthy" by John W. Stroupe, Jr. (Stroupe), a mechanic who held a certificate from the FAA. In the post-

crash examination, it was determined that the engine overhaul performed by Stroupe was either fraudulently or grossly negligent.

For over twenty years, the FAA has ignored or sanctioned repeated incidents demonstrating that Stroupe was grossly incompetent to perform work on aircraft engines or to certify them as airworthy. Considering the list and types of infractions for which Stroupe has been found guilty, it is utterly inconceivable that the FAA would have continued to certify Stroupe as being competent to perform repair and maintenance to aircraft upon which members of the public rely and entrust their lives. The following is a list of Stroupe's egregious infractions of Federal Aviation Regulations:

> January 30, 1953: Stroupe's powerplant rating is denied due to a failure to correctly identify aircraft components.
>
> March 19, 1953: Stroupe's powerplant

rating is denied due to his lack of knowledge concerning powerplants.

July 10, 1953: Stroupe's powerplant rating is denied due to an improper engine overhaul.

September 14, 1953: Stroupe finally obtained a mechanic's certificate with a powerplant rating.

September 6, 1958: Stroupe obtained an airframe rating.

January 31, 1961: Stroupe's mechanics certificate was suspended for sixty days for installing the WRONG engine in an aircraft.

March 29, 1971: The Southern Regional Counsel proposed to revoke Stroupe's mechanic's certificate for improper engine overhaul including piston rings that were worn beyond specifications, severe corrosion in the intake and exhaust valve stems, and valve faces being worn beyond specifications.

June 4, 1971: Following an informal conference with the Regional Counsel's office, Stroupe's certificate was suspended for six months. On December 15, 1971, that suspension was reduced to three months upon appeal to the National Transportation Safety Board law judge. That hearing revealed that Stroupe did not have the correct overhaul manual while ordering parts for the aircraft's engine, and he could not properly identify correct components for the engine.

July 21, 1972: Stroupe's powerplant rating was suspended for ninety days.

March 15, 1974: It was proposed that Stroupe's powerplant rating be revoked for improper overhaul of an aircraft engine which included cracks in the crankshaft propeller flange radius, the flange being bent in excess of approved tolerances, and the valves which had been ground beyond limitations. In an informal meeting with the Regional Counsel on April 3, 1974, Stroupe stated he only signed off the logbook and that he did not assemble the engine, therefore he was not responsible (a clear violation of Federal Aviation Regulations).

August 12, 1974: Stroupe's mechanic's certificate and inspection authorization were both revoked. On May 16, 1975, the NTSB law judge upheld the revocation, but on September 12, 1975, the full board of the National Transportation Board upheld the revocation of the inspection authorization, but suspended the mechanic's certificate for ninety days only.

July 20, 1976: Stroupe's powerplant rating was suspended for six months. (How did he get it back?)

March 17, 1978: Stroupe's powerplant rating was revoked for a second time!

December 13, 1982: Stroupe's powerplant rating was revoked for a third time!

August 3, 1987: At the Air Center of Miami, another engine that Stroupe had worked on was found to have serious problems. The investigation disclosed that Stroupe had failed to use proper

> maintenance techniques and procedures; the engine was not at least equal to its original properly altered condition and was not airworthy; that he had made SEVERAL FRAUDULENT entries in the maintenance log, and that he had failed to enter his certificate number into the logbook.

The August 3, 1987 infractions were the latest violations by Stroupe of Federal Aviation Regulations prior to the crash that occurred in this case. The FAA actually knew of these violations on August 3, 1987. These violations were of such life-threatening magnitude that the FAA was required, under its own internal compliance and enforcement Order 2150.3, to revoke his mechanic's certificate immediately on August 3, 1987. Instead of acting immediately, the FAA disregarded its own regulations and delayed action for two months, until October 2, 1987, when it finally used its emergency powers to revoke Stroupe's mechanic's certificate for the fourth time in thirteen years. During that

two-month delay, Stroupe was allowed by the FAA to operate under its authority and to perform the engine overhaul on the Piper aircraft that crashed in this case. Stroupe certified the plane as airworthy on October 1, 1987, just one day before the fourth revocation by the FAA of his certificate.

These infractions by Stroupe were not of a minor or hyper-technical type. Rather, these infractions were as life-threatening as certifying that repair and maintenance to aircraft had been performed when in fact it had not, installing the wrong aircraft engine in an airplane, and being unable to identify the appropriate components to be installed into an aircraft engine. Perhaps even more detrimental to the safety of the flying public, Stroupe had been found guilty of fraud in the performance of his work.

By 1987, the FAA was grossly negligent

in permitting Stroupe to have any authority to work on, or inspect, aircraft engines of any sort. Despite this extensive knowledge of Stroupe's incompetence and dishonesty, the FAA permitted Stroupe to continue to operate under the FAA certificate of approval.

Between the time that the FAA was required, under its own regulations, to revoke Stroupe's certificate on August 3, 1987, and the actual revocation of his certificate two months later, Stroupe was permitted by the FAA to operate under its seal of approval. As a result, Stroupe performed, in early September, 1987, the engine overhaul on the Piper aircraft which crashed in this case. On October 1, 1987, just one day before the FAA finally revoked his mechanic's certificate, Stroupe certified that the engine had been overhauled and that the aircraft was airworthy. These certifications were

supposed to be the owner's guarantee that the maintenance had been conducted in accordance with FAA regulations and the manufacturer's specifications, i.e., that the aircraft was safe to fly.

It is the pilot's responsibility, before bringing the aircraft to flight, to check the sign off in the logbook by an FAA certified mechanic, which verifies that the aircraft is airworthy. No pilot could ever have his aircraft's maintenance accomplished or inspected by a mechanic who was not certified by the Federal Aviation Administration. First, to do so would be foolish. Second, if the work has not been performed and inspected by a FAA certified mechanic, then the aircraft is not legally airworthy. It must be stressed that the FAA is the only entity which, through its certified mechanic, can certify an aircraft as airworthy for flight. If the aircraft has not been certified by the FAA-approved

mechanic as airworthy, the plane cannot be released for flight.

It is incomprehensible that the FAA, knowing the enormous reliance that pilots and passengers place on the FAA's certification of mechanics, did not take immediate action, on August 3, 1987, to revoke the certificate of Stroupe. Such action would have prevented him from performing the fundamental and life-threatening work to the aircraft occupied by petitioners' decedents. At the very least, any concept of minimal due care would have required the FAA to make a simple telephone call to warn owners and operators of the Piper aircraft that their plane had been certified as airworthy by a mechanic known by the FAA to be fraudulent and grossly incompetent!

Order 2150.3, the FAA's own internal procedure, required the FAA to immediately revoke Stroupe's authority to overhaul and

inspect aircraft engines and certify them as airworthy. If the FAA had not violated its own regulations by delaying for two months the fourth revocation of Stroupe's certificate, he would not have been in a position to release the aircraft for flight. If, after the August 3, 1987 violations by Stroupe of Federal Aviation Regulations, the FAA had immediately revoked his certificate as required by its own internal regulations, the pilots and passengers of the Piper aircraft would not have died in the tragic crash that occurred on December 6, 1987.

It is undisputed that the FAA had actual knowledge of the mechanic's incompetence for two months before taking action to issue its emergency revocation. The failure of the FAA to prevent Stroupe from performing overhaul and maintenance to aircraft, or to certify the aircraft as being airworthy, borders on criminal

negligence. The FAA failed to follow its own procedures, causing the fatal crash in this case.

2. Procedural Facts

In response to Petitioner's Complaint the United States filed a Motion to Dismiss. The United States never filed an Answer. Petitioners have not completed their discovery. The District Court granted the Motion to Dismiss. On appeal to the Eleventh Circuit, the District Court's dismissal was affirmed without an opinion. On October 17, 1991, the Eleventh Circuit entered an Order denying a Motion for Rehearing or Rehearing in banc.

Summary of Argument

In essence, petitioners seek to recover against the United States pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 2671 et seq for the negligence of the FAA in causing the death of petitioners' decedents. The FAA caused these deaths by failing to exercise ordinary care to carry out duties created under Georgia law and duties created by Federal mandates.

Petitioners seek to recover for the negligent failure of the FAA to follow its own internal orders that required it to immediately revoke John W. Stroupe's authority to certify aircraft as airworthy. The FAA's delay caused the death of four persons, including petitioners' decedents. Petitioners seek to recover for the negligence of the FAA in recertifying, after revocation, the certificate of Stroupe authorizing him to overhaul and inspect aircraft when the FAA already knew,

in no uncertain terms, that Stroupe was grossly incompetent and had falsified records.

In holding that the FAA could not possibly owe an actionable duty to petitioners' decedents, the Court of Appeals for the Eleventh Circuit in this case directly contradicts the decisions in another circuit based on the same issues. United Scottish Ins. v. United States, 692 F.2d 1209 (9th Cir. 1982), rev'd on other grounds 467 U.S. 797 (1984). At the same time the decision at issue here ignores the clear law in the state of Georgia that would create an actionable duty in a private citizen if he were in the same position as the United States.

Moreover, the Eleventh Circuit's decision in this case violates the principles set forth in Berkowitz v. United States, 486 U.S. 531 (1988). After this Court decided Varig, infra the United

States took the position that a federal agency's regulatory activities could never give rise to a private cause of action. In Berkowitz this Court squarely held that where an agency of the United States violates its own internal rules and regulations that negligence may give rise to a private cause of action.

The District Court's grant of a Motion to Dismiss for failure to state a claim in the absence of any factual record is such a blatant departure from normal judicial proceedings as to require reversal.

ARGUMENT

I. The FAA's negligent violation of its own procedures gives rise to a private cause of action.

Four people were killed as the result of the gross negligence of the FAA in repeatedly re-certifying an incompetent and dishonest mechanic and then failing to promptly revoke the certificate after learning of yet another violation. The FAA had known for more than ten years that the mechanic was grossly incompetent to perform the kind of service on aircraft in which petitioners' decedents entrusted their lives.

The FAA had actual and specific knowledge of the gross incompetence and repeated infractions of aircraft mechanic John W. Stroupe for many years prior to the fatal crash that occurred here. Three

times, in 1974, 1978 and again in 1982, the FAA had revoked Stroupe's certificate. Three times, for reasons known only to the FAA, this incompetent and dishonest mechanic had been re-certified! Then, on August 3, 1987, the FAA learned of the latest violations of Federal Aviation regulations by Stroupe that required the FAA, under its own internal compliance and enforcement regulation Order 2150.3, to revoke his mechanic's certificate immediately.

Despite this actual knowledge obtained on August 3, 1987, the FAA completely disregarded its own regulations. Instead of acting immediately, and with blatant indifference to the safety of the public, the FAA delayed for two months before finally issuing that revocation on October 2, 1987. Tragically and predictably, the hazard that FAA Order 2150.3 was designed to eliminate was set in motion on October

1, 1987. Just one day before the FAA finally revoked Stroupe's certificate, he signed off on the log books certifying that aircraft in question as airworthy.

Two months later, petitioners' decedents were killed when the Piper aircraft in which they were passengers lost engine power and crashed into a highway overpass. Post-crash investigation revealed that Stroupe had performed a negligent engine overhaul to the Piper aircraft but had returned the aircraft to service, certified as "airworthy." Had the FAA used ordinary care in revoking the mechanic's certificate of Stroupe on August 3, 1987, as required by its own internal orders, four individuals, including petitioners' decedents, would not have been killed in this tragic crash.

Under the Federal Tort Claims Act, the United States is frequently found liable when air traffic controllers violate the

requirements of their own operations manual. See e.g., Ingham v. Eastern Air Lines, Inc., 373 F.2d 227, 223 (2nd Cir. 1967), cert. denied, 389 U.S. 961 (1967); Yates v. United States, 497 F.2d 878 (10th Cir. 1974); Wasilko v. United States, 300 F.Supp. 573 (N.D. Ohio 1967), aff'd, 412 F.2d 859 (1969). By analogy, the air traffic controller cases are clear precedent for the petitioners' contention that their complaint states a claim.

The Federal Aviation Act of 1958 is the origin of the FAA's statutorily imposed duty and undertaking in this case. The preamble to that Act describes it as:

> An act to continue the Civil Aeronautics Board as an agency of the United States, to create a Federal Aviation Agency, to provide for the regulation and promotion of civil aviation in such manner as to best foster its development and safety, and to provide for the safe and efficient use of the air space by both civil and military aircraft, and for other purposes.

Act of August 23, 1958 (Public Law 85-726, 85th Cong., Second Sess. 72 Stat. 731; 49 U.S.C. § 1301.) Section 102 of the Federal Aviation Act of 1958 includes the following language under its declaration of policy:

> (a) In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity: (1) the assignment and maintenance of safety as the highest priority in air commerce ... (2) the prevention of any deteriorating in established safety procedures, recognizing the clear intent, encouragement and dedication of the Congress to the furtherance of the highest degree of safety in air transportation and air commerce, and the maintenance of the safety vigilance that has evolved within air transportation and air commerce and has come to be expected by the traveling and shipping public...

49 U.S.C. § 1302. That Act also states:

> (a) The Secretary of Transportation is

empowered and it shall be his duty to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time: (1) such minimum standards governing the design, materials, workmanship, construction and performance of aircraft, aircraft engines, and propellers as may be required in the interest of safety.... (3) reasonable rules and regulations and minimum standards governing, in the interest of safety, (A) the inspection, servicing, and overhaul of aircraft, aircraft engines, propellers, and appliances; (B) the equipment and facilities for such inspection, servicing, and overhaul; and (C) in the discretion of the Secretary of Transportation, the periods for, and the manner in which, such inspection, servicing and overhaul shall be made, including provision for examinations and reports by properly qualified service persons whose examinations or reports the Secretary of Transportation may accept in lieu of those made by its officers and employees....

49 U.S.C. § 1421.

Under the authority of the Federal Aviation Act of 1958, the Federal Aviation Administration, in conjunction with the Department of Transportation, has promulgated the Federal Aviation Requirements found in 14 CFR § 13.1 et seq. That regulation contains the following language:

> (b) If, as a result of such a reinspection, reexamination, or other investigation made by the Administrator under Section 609 of the FAA Act, the Administrator determines that the public interest and safety in air commerce requires it, the Administrator may issue an order amending, suspending, or revoking, all or part of any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate or air agency certificate....

14 CFR § 13.19(b). In this context, Mr. Stroupe held an "airman certificate." 49 U.S.C. § 1301(7).

Pursuant to that Federal Aviation

Regulation, the Department of Transportation, Federal Aviation Administration has promulgated Order 2150.3 entitled Compliance and Enforcement Program. This Order fills out the specifics of how the purpose contained in the Federal Aviation Act of 1958 and the specific rules contained in 14 CFR are to be carried out. Chapter 2 of that document contains the following guidance for those individuals within the FAA who must carry out the FAA's duties and responsibilities on a daily basis. This is the document that establishes the standard of care for the people alleged to have been negligent in this case. This material expressly states that:

> The FAA is charged with the responsibility to assure that the highest possible degree of safety in air transportation and air commerce is maintained....
>
> (b) Finally, the agency has a statutory

obligation to assure compliance with all regulations. This obligation is especially critical as it applies to holders of FAA certificates. Individual inspectors, managers, and attorneys must clearly understand the crucial role they play in achieving compliance....

The Federal Aviation Act of 1958 places a duty on the administrator to prescribe reasonable rules, regulations, orders, and minimum standards in the public interest. Once a regulation is issued, it is expected there will be compliance with all requirements contained in the regulation. A violation of any regulation must be responded to with an effective enforcement program....

Prompt action is essential to assure a fair enforcement program. Unnecessary delays in the investigation cannot be tolerated. Every effort must be made to expeditiously investigate and report violations. The responsibility to act promptly rests equally upon the inspector investigating the incident as well as the regional and Washington offices responsible for enforcement action. Delays in processing violation

reports weaken the effectiveness of the agency's enforcement program in several ways. First, such delays may permit an unsafe condition to prevail if prompt corrective action is not taken.... (Emphasis added).

When violations occur, firm action must be taken. A vigorous enforcement policy is necessary to achieve compliance with the regulations and we must forcefully respond to violations....

(1) Revocation of a certificate or a rating should be sought in all cases where there is lack of capability or other deficiency incapable of immediate correction; in cases where the certificate holder has demonstrated by repeated offenses an unwillingness or inability to comply with the principles of air safety; and in cases where the continued exercise by the individual of the privileges of the certificate would be detrimental to the public interests. For example, revocation should be sought in cases where an aircraft is used for smuggling or transporting narcotics or where there is falsification of records. (Emphasis added).

(2) In cases involving organizations, revocation should be sought where their conduct demonstrates lack of qualifications; i.e., deliberate and flagrant violations; falsification of records....

(1) Emergency suspension or revocation of certificates.

(a) Emergency action in suspending or revoking a certificate or manufacturing approval should be taken only when it is clearly needed in the public interest and must be taken immediately when the need for such action is recognized.

The emergency authority will not be used for punitive reasons. Evidence for such action must show a lack of qualification or that the certificate holder likely will continue exercising the privileges of the certificate.

(b) The following are examples of when emergency action might be appropriate:

> 5. When the holder of a repair station certificate returns unairworthy aircraft to service, and it is determined that they do not have an inspection system that will produce satisfactory quality control. (Emphasis added).

The facts alleged in this case demonstrate that the FAA had actual knowledge, on August 3, 1987, of the following: (1) that John Stroupe, despite three prior revocations, held a mechanic's certificate; (2) that John Stroupe was grossly incompetent to overhaul or inspect aircraft engines; (3) that John Stroupe was known to have falsified records; (4) that John Stroupe did not have an inspection system that would produce satisfactory quality control; and (5) that John Stroupe returned another unworthy aircraft (not the aircraft at issue) to service. The government cannot deny any of these

allegations, since the FAA exercised its powers under the emergency revocation provisions to revoke Stroupe's certificate on October 2, 1987. That order was ultimately affirmed by the full board of the NTSB by order of January 20, 1988.

Such statutes, regulations and orders have the effect of law, and provide a sufficient basis for many courts to find that the government had a duty. Where Courts have allowed such statutes to establish a duty, it is usually based on the government's undertaking that particular responsibility. It is clear that the federal government has made the commitment to occupy the field of regulating aviation maintenance to the extent of preempting any state law on the subject. 49 U.S.C.§ 1305; 14 C.F.R. § 43.5 (1988); 14 C.F.R. § 43.7 (1988); 14 C.F.R. § 91.29 (1988).

The FAA obviously undertook to render

services to the public, and specifically to pilots and passengers of aircraft, by implementing its extensive regulations governing air safety. Pursuant to the Federal Aviation Act of 1958, 49 U.S.C. § 1301 et seq. and its predecessor, the Civil Aeronautics Act, the FAA has undertaken to regulate and promote civil aviation to provide for the public safety, including undertaking a procedure to certify aircraft mechanics as being competent and diligent in their mechanical skills and in certifying aircraft as airworthy. In addition, the FAA has undertaken the obligation to revoke such certificates immediately, when such prompt action is necessary to protect the public.

Once it undertook to certify mechanics, which effectively prohibits anyone not holding an FAA certificate from working on the powerplant or airframe of aircraft, the FAA thereby engendered reliance by pilots

and passengers on such procedures. The FAA thus gave rise to an obligation to use due care in connection with its entire certification process. A good example of this reasoning can be found in Indian Towing Co., Inc. v. United States, 350 U.S. 61 (1955), where this Court found the Coast Guard negligent in the operation and maintenance of a lighthouse. There the Court explained the government's obligation once it has assumed an undertaking such as was done in this case. This Court stated:

> The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed

in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act.

Id. at 69.

Similarly, in Ingham v. Eastern Air Lines, Inc., 373 F.2d 227 (2d Cir. 1967), cert. denied, 389 U.S. 931 (1967), the Court found that the air traffic controller violated a duty set forth in the Air Traffic Control Procedures Manual of the FAA. In Ingham, the FAA's internal procedures manual called for the reporting of weather conditions to pilots; in the case presently before the Court, the FAA's internal compliance and enforcement program contained in Order 2150.3 states that an emergency revocation of a mechanic's certificate must be taken immediately when the need for such action is recognized.

As in Indian Towing and Ingham, the FAA clearly violated its own order in this case. Not only did the FAA have actual knowledge, for many years, of Stroupe's

gross negligence and dishonesty, but the FAA again received notification of the need for an immediate revocation as the result of the incident on August 3, 1987. Yet, the FAA failed to act immediately, delaying until October 2, 1987, the revocation of Stroupe's certificate. This violation by the FAA of its own order caused the death of four persons!

Petitioners have stated a claim under the Georgia Good Samaritan doctrine. Georgia has adopted the Restatement (Second) of Torts, § 324(a) as the substantive law of the state. Huggins v. Aetna Casualty & Surety Co., 245 Ga. 248, 264 S.E.2d 191 (1980). Where states have adopted that legal principle, an actionable duty has been found as against the United States. S.A. Empressa De Viacao Aera Rio Grandense (Vairg Air Lines) v. United States, 692 F.2d 1205 (9th Cir. 1982), rev'd on other grounds, 467 U.S. 797

(1984); United Scottish Ins. v. United States, 692 F.2d 1209 (9th Cir. 1982), rev'd on other grounds, 467 U.S. 797 (1984). Each of those cases was overturned by this Court pursuant to the discretionary function exception to the Federal Tort Claims Act. The United States has not raised the discretionary function defense in this case. See Berkovitz v. United States, 486 U.S. 531 (1988).

In addition to the Good Samaritan Doctrine, Georgia negligence law contains other sources of a duty running from the FAA to the decedents. United States of America v. Aretz, 248 Ga. 19, 280 S.E.2d 345 (1981)(improper classification of explosives gave rise to an actionable duty from the United States to employees of the government's contractor); Hardy v. Brooks, 103 Ga. App. 124, 118 S.E.2d 492 (1961)(man with knowledge of a dead cow in the road has actionable duty to the traveling public

to either (1) remove the cow from the highway, or (2) give warning to others of its presence); Bradley Center, Inc. v. Wessner, 250 Ga. 199, 296 S.E.2d 693 (1982)(following Restatement Second, Tort § 319, Georgia law provides that one who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person form preventing him from doing such harm); see also Jablonski v. United States, 712 F.2d 391 (9th Cir. 1983); Sims v. American Cas. Co., 131 Ga. App. 461, 206 S.E.2d 121, aff'd sub nom, Providence Washington Ins. Co. v. Sims, 232 Ga. 797, 209 S.E.2d 61 (1974)(persons relying on the inspection conducted by a third party have an actionable claim against the inspector even though the inspection was not conducted directly for the benefit of those relying

on it.)

The District Court dismissed petitioners' case for failure to state a claim upon which relief can be granted, finding that there was no duty owed by the United States to the petitioners' decedents. Whether the duty is found in the federal law, regulations and orders governing FAA performance, or whether it is found in the common law and statutes of the State of Georgia, the District Court clearly erred in holding that no duty existed. Consequently, the Eleventh Circuit Court of Appeals erred in affirming, without an opinion, the District Court's dismissal.

This Court should grant this Petition for Writ of Certiorari because the Eleventh Circuit's ruling in this case is in direct contradiction of the Ninth Circuit's holding on the same issue. Additionally, this Court should grant the Petition for

Writ of Certiorari, because the Eleventh Circuit's opinion directly contradicts Berkovitz. The Eleventh Circuit's action could only be correct if the federal government never owes any actionable duty to the public as a result of regulatory activities. In Berkovitz, this Court held that some regulatory activities, especially those in direct violation of the agency's own mandates, give rise to an actionable duty and a private cause of action against the United States.

If the FAA is going to be relieved of all liability for its negligent failure to perform safety related duties and responsibilities mandated by its own statutes and regulations, then tell us now! The public should be advised that it has no right to rely on the duties and responsibilities assigned to the Federal Aviation Administration by Congress. If followed under the facts of this case, this

line of thinking would overturn Berkovitz.

The only possible rationale for dismissing a case before discovery, is if the Complaint could not state a claim under any possible set of facts. That could only occur in this case if the regulatory activities of federal agencies could never give rise to a private cause of action. Berkovitz teaches otherwise. While the discretionary function is not at issue in this case, Berkovitz stands for the proposition that under some set of facts, where the federal agency has negligently violated its own internal procedures, a private person who is injured by that negligence has a cause of action. Accordingly, petitioners respectfully request this Court grant this Petition for Writ of Certiorari.

II. The trial court's dismissal of this case was far outside the accepted and usual course of judicial proceedings.

After the complaint was filed in this case, the United States filed a Motion to Dismiss. No answer was ever filed. Petitioners have not been permitted reasonable discovery.

A dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure is proper only in extraordinary cases and is generally disfavored by the courts. The moving party has the burden of demonstrating that no claim has been stated and the court must accept all factual allegations of the complaint as true, as well as all reasonable inferences therefrom. 2A Moore's Federal Practice, par. 12.07 [2.-5]; United States v. City of Redwood City, 640 F.2d 963 (9th Cir. 1981); Miree v. DeKalb County, Georgia, 433 U.S. 25 (1977); Bank of America Nat. Trust & Sav. Ass'n v. Touche Ross & Co., 782 F.2d 966 (11th Cir. 1986).

None of the factual issues in this case

have been fully developed. In this posture, the trial court may consider only the pleadings in determining a motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Otherwise, it must convert the motion into a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. 2A Moore's Federal Practice, par. 12.07 [2.-5]. The trial court in this case did not convert the 12(b)(6) motion to a motion for summary judgment; therefore, it was appropriate for the trial court to consider nothing but the pleadings. In considering those pleadings, the trial court is bound to liberally construe the allegations of the complaint. Sinclair v. Kleindienst, 711 F.2d 291 (D.C. Cir. 1983).

The trial court's order begins by acknowledging that "the court must accept the plaintiffs' allegations as true" and that "the movant has the burden to show clearly that no relief could be granted [to

the plaintiffs] under any set of facts." Order at 3, Smith v. United States, (No. 3:89-cv-147-GET). Then, the trial court goes on to make numerous findings of fact which are not, and could not have been, based on the record. The trial court committed reversible error by making the following findings of fact:

(1) On page 5 of the District Court's Order of Dismissal, it makes the finding that "...plaintiffs have not and cannot show that the F.A.A.'s 'undertaking' to certify the mechanic was for their benefit," but the plaintiffs have no burden to show that the FAA's undertaking was for their benefit in their pleadings. These factual issues are properly developed during discovery, and the trial court clearly erred in holding plaintiffs to this burden of proof at this early stage in the proceedings.

(2) On page 5 of the Order of

Dismissal, the Court draws the erroneous conclusion that, because plaintiffs alleged in its complaint that Stroupe negligently inspected the plane, it follows that the "...defendant did not create the hazardous situation..." To the contrary, the plaintiffs clearly alleged in their complaint that the hazardous situation was created by the negligence of the FAA in failing to comply with its own rules which required it to revoke immediately the certificate of a mechanic known by the FAA to be untrustworthy and grossly incompetent. If the FAA had complied with its own mandatory procedures, the petitioners would not have been killed in this tragic accident.

(3) On page 5 of the Order of Dismissal, the Court makes the erroneous statement that "[f]inally, plaintiffs have failed to present any factual support for their conclusion that the decedents

'actually relied' on the F.A.A. inspection." In response to a motion to dismiss under Rule 12(b)(6), the plaintiffs have no burden to present any factual support for their allegations. The accepted rule is that a complaint should not be dismissed under Rule 12(b)(6) where it sets forth allegations which, if proved, would support its claims. The claimant is still entitled to offer evidence to support its claim, even if the face of the pleadings indicate that recovery is very remote. See, e.g., United States v. City of Redwood City, 640 F.2d 963 (9th Cir. 1981). The trial court clearly erred in holding the plaintiffs to the wrong burden of proof in this instance. The error is further compounded by the fact that the reliance is established in this case as a matter of law. United Scottish Ins. Co. v. United States, 692 F.2d 1209, 1211 (9th Cir. 1982), rev'd on other grounds, 467

U.S. 797 (1984).

The trial court clearly and blatantly used the wrong analysis by which to decide a Rule 12(b)(6) motion and therefore the trial court should be reversed. It follows that the Eleventh Circuit departed from the accepted and usual course of judicial proceedings by affirming and effectively adopting the trial court's error. For this reason, petitioners respectfully pray this Court to grant the Writ of Certiorari so that petitioners' claims will be reinstated.

Conclusion

The above discussion clearly demonstrates that the trial court erred in granting a Motion to Dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The Order on its face applies the wrong standard of decision in requiring plaintiffs to have provided the Court with

Dismiss. For that reason, the trial court's decision should have been reversed by the Eleventh Circuit.

Further, the discussion above clearly demonstrates numerous theories under which the United States could be found to owe a duty of ordinary care to the decedents in this case. The FAA is the only entity which, through its certified mechanic, can certify an aircraft as airworthy. There is ample information available from which this Court can rule as a matter of law that a duty existed, but this Court need not go that far. It is equally obvious that a question of fact would have to exist as to whether or not a duty had arisen, on the part of the government, to act reasonably in order to protect the plaintiffs. It cannot be reasonably asserted that no duty would exist under any possible set of facts which could be proved on the trial of the claims alleged in plaintiffs' complaint.

Therefore, it was again error for the trial court to grant the government's Motion to Dismiss. Additionally, it was error for the Eleventh Circuit to affirm the District Court's dismissal.

Since the Eleventh Circuit ruling establishes a conflict between the Ninth and Eleventh Circuits, since the Eleventh Circuit ruling flies in the face of this Court's holding in Berkowitz, since the Eleventh Circuit has sanctioned such a blatant departure from the normal handling of judicial proceedings, the Petitioners respectfully pray this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,
BY /s/ Foy R. Devine
Attorney for Smith

FOY R. DEVINE, P.C.
2931 Piedmont Road, N.E.
Atlanta, Georgia 30305
404/233-4141

BY /s/ Dennis N. Powers
Attorney for Ayers

POWERS, HALLOWELL AND NICKOLAI
2254 E. Highland Road
Highland, Michigan 48031
313/887-8333

Attorneys for Petitioners

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

JO A SMITH, Individually, and as Administratrix of the Estate of David Allen Smith, and JIMMIE A. SMITH, and KATHLEEN A. AYERS, Individually and as Administratrix of the Estate of the KELLY JEAN LASKE	:	
Plaintiffs,	:	
v.	:	3:89-CV147 GET
UNITED STATES OF AMERICA,	:	
Defendant.	:	

COMPLAINT

Come now the Plaintiffs, by and through their undersigned counsel, and file their Complaint as follows:

1.

This is a matter ln controversy exceeding Fifty Thousand Dollars ($50,000.00), exclusive of interest and costs.

2.

Plaintiff, Jo A. Smith, is a resident of Cobb County, Georgia, and is sui juris. Plaintiff, Jimmie A. Smith is a resident of Kent, Washington, and is sui juris. Said Plaintiffs are the parents of David Allen

Smith, deceased, and Jo A. Smith is Administratrix of the Estate of David Allen Smith.

3.

Plaintiff, Kathleen A. Ayers, is a resident of Oakland County, Michigan, and is sui juris. Plaintiff is a parent of Kelly Jean Laske, deceased and is Administratrix of the Estate of Kelly Jean Laske.

4.

This is an action arising under the Federal Tort Claims Act, Title 28, United States Code, §§2671-2680, and jurisdiction vests in this Court pursuant to Title 28, United States Code, §1346(b). The United States of America is sued for negligent acts and omissions of its agents and/or employees specifically those of the Federal Aviation Administration.

5.

The Plaintiff, Jo A. Smith, has complied with all notice requirements of 28 USC §2675. The United States has rejected Plaintiff's claim by letter dated September 22, 1989, a copy of which is attached hereto as Exhibit "A-1".

6.

The Plaintiff, Kathleen A. Ayers,has complied with all notice requirements of 28

USC §2875. The United States has rejected Plaintiff's claim by letter dated September 22, 1989, a copy of which is attached hereto as Exhibit "A-2".

7.

On or about December 6, 1987, Plaintiffs' decedents, David Allen Smith and Kathleen A. Ayers, were a passengers ln a Piper Pa-32-260 aircraft, N5587J (hereinafter referred to as the "subject aircraft"), which lost engine power during cruise flight and subsequently struck a highway overpass while attempting a forced landing. David Allen Smith and Kelly Jean Laske received fatal injuries as a result this incident.

8.

The loss of engine power was a result of an inoperative magneto, spark plug gaps, a malfunctioning carburetor accelerator pump and leaks in both throttle shaft packings resulting from a negligent engine overhaul performed on the subject aircraft during September, 1987, by John Winslow Stroupe, Jr. and Coastal Air Engine Service of Gastonia, North Carolina, Inc.

9.

In September, 1987, Coastal Air Engine Service of Gastonia, North Carolina, Inc., according to entries signed by John Winslow

Stroupe, Jr., performed a major overhaul on the Lycoming O-540-E4BS engine, serial number L-9232-40, which had been pulled from the subject aircraft.

10.

On or about October 1, 1987, John Winslow Stroupe, Jr. certified the subject aircraft as airworthy.

11.

On or about August 3, 1987, just two months prior to certifying the above-mentioned Piper Pa-32-260 airworthy, John Winslow Stroupe, Jr. was cited by the Federal Aviation Administration for, inter alia, failing "to use proper maintenance techniques and procedures".

12.

On or about October 2, 1987, based upon the conduct originally cited on August 3, 1987, the Federal Aviation Administration revoked, on an emergency basis, the certificate of John Winslow Stroupe, Jr. due to improper maintenance practices and fraudulent entries in the maintenance log.

13.

John Winslow Stroupe, Jr. had violated Federal Aviation Regulations and his certificates had been suspended or revoked on numerous occasions prior to October 2, 1987.

14.

At all times material to this action, the Defendant, The United States of America by and through its agents and/or employees had a duty to the Plaintiffs' decedents and their pilot.

15.

The Defendant, The United States of America, breached its duty to the Plaintiffs' decedents by failing to revoke the certificate of John Winslow Stroupe, Jr. immediately upon learning of the violations for which he was cited on August 3, 1987, and, in any event, prior to his certification on October 1, 1987, that the subject aircraft was airworthy.

16.

The Defendant, the United States of America, breached its duty to the Plaintiffs' decedents by failing to notify the owner and operator of the subject aircraft that the certificate of John Winslow Stroupe, Jr. had been revoked by the Federal Aviation Administration on October 2, 1987, and that the subject aircraft may not be airworthy as was certified by John Winslow Stroupe, Jr. on October 1, 1987.

17.

As a direct and proximate result of the

negligence of the Defendant, The United States of America, the Plaintiffs' decedents were subjected to the terror of an impending crash and fatal injuries.

18.

At the time of his death on December 6, 1987, Plaintiffs Smith's decedent, David Allen Smith, was 28 years of age, having been born on October 19, 1959. He had never been married and had no children.

19.

At the time of her death on December 6, 1987, Plaintiff Ayer's decedent, Kelly Jean Laske, was 21 years of age, having been born on December 2, 1966. She had never been married and had no children.

20.

David Allen Smith was a college graduate with a degree in accounting and worked as a budget analyst for Lockheed, Georgia. He had worked for Lockheed for more than three years, and at the time of his death was earning in excess of $26,000.00 per year.

21.

Kelly Jean Laske was attending college and working as a secretary for Kidder Peabody.

22.

The Defendant, the United States of

America, is liable to the Plaintiffs for the full value of the life of their decedents, David Allen Smith and Kelly Jean Laske.

23.

The Defendant, the United States of America, is liable to the Estates of David Allen Smith and Kelly Jean Laske for the terror experienced by them prior to the fatal crash, for conscious pain and suffering after the crash, for emergency medical services, for funeral expenses and burial expenses.

WHEREFORE, Plaintiffs pray as follows:

(a) That a Summons and a copy of this Complaint be served upon the United States of America as provided by law;

(b) That this Court enter a judgment on behalf of Jo A. Smith and Jimmie A. Smith against the Defendant for an amount which will be sufficient to compensate them for the full value of the life of their decedent, David Allen Smith, as shown by all the evidence, without deduction for expenses of the decedent had he lived;

(c) That this Court enter a judgment on behalf of Kathleen A. Ayers against the Defendant for an amount which will be sufficient to compensate her for the full value of the life of their decedent, Kelly

Jean Laske, as shown by all the evidence, without deduction for expenses of the decedent had she lived;

(d) That this Court enter a judgment ln favor of the Estate of David Allen Smith against the Defendant for an amount as will fairly and adequately compensate the estate for the terror experienced by the decedent prior to the fatal crash, for conscious pain and suffering after the crash, for emergency medical services, for funeral expenses and for burial expenses; and

(e) That this Court enter a judgment in favor of the Estate of Kelly Jean Laske against the Defendant for an amount as will fairly and adequately compensate the Estate for the terror experienced by the decedent prior to the fatal crash, for conscious pain and suffering after the crash, for emergency medical services, for funeral expenses and for burial expenses; and

(d) For such and further relief as this Court deems just and proper.

Respectfully submitted,
FOY R. DEVINE, P.C.
/s/ Foy R. Devine
Attorneys for Plaintiffs
Jo A. Smith and Jimmie A.

Smith

State Bar No. 219900

2931 Piedmont Rd.

Atlanta, GA 30305

404/233-4141

POWERS, HALLOWELL AND NICKOLAI

/s/ Dennis N Powers

Attorney for Plaintiff

Kathleen A. Ayers

2254 E. Highland Rd.

Highland, MI 48031

313/887-8333

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

JO A SMITH, Individually, and as Administratrix of the Estate of David Allen Smith, and JIMMIE A. SMITH, and KATHLEEN A. AYERS, Individually and as Administratrix of the Estate of the KELLY JEAN LASKE	:	
Plaintiffs,	:	3:89-CV-147 GET
v.	:	
UNITED STATES OF AMERICA,	:	
Defendant.	:	

DEFENDANT'S MOTION TO DISMISS

COMES NOW the defendant, by and through the United States Attorney for the Northern District of Georgia, and moves this court to dismiss plaintiff's complaint pursuant to Rule 12(b)(1) and (6), Fed.R.Civ.P., on the grounds of lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted and improper venue.

The grounds for this motion are set forth in the accompanying memorandum of law.

Respectfully submitted,
RIMANTAS A. RUKSTELE
UNITED STATES ATTORNEY
/S/ Amy B. Kaminshine
Assistant U. S. Attorney

1800 U.S. Courthouse
75 Spring Street, S.W.
Atlanta, GA 30335
404/331-4681
Georgia Bar No. 006670

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

JO A SMITH, Individually, and as Administratrix of the Estate of David Allen Smith, and JIMMIE A. SMITH, and KATHLEEN A. AYERS, Individually and as Administratrix of the Estate of the KELLY JEAN LASKE	:	
Plaintiffs,	:	3:89-CV-147 GET
v.	:	
UNITED STATES OF AMERICA,	:	
Defendant.	:	

ORDER

The above styled matter is before the court on defendant's motion to dismiss pursuant to F.R.C.P. Rules 12(b)(1) and 12(b)(6).

The underlying action involves a suit against the United States of America for negligence brought pursuant to the Federal Tort Claims Act, ("F.T.C.A.") 28 U.S.C. § 2671 et. seq. On December 6, 1987, David Smith ("Smith") and Kelly Laske ("Laske") were killed in a plane crash in LaGrange, Georgia. Plaintiffs Jo A. and Jimmie A. Smith are the parents of David Smith. Plaintiff Kathleen Ayers is the

parent of Kelly Laske.

Plaintiffs contend that, four months before the plane crash, on August 3, 1987, the Federal Aviation Administration ("F.A.A.") had "cited" John Winslow Stroupe, Jr., a certified mechanic employed by Coastal Air Engine Service of Gastonia, North Carolina ("Coastal"), for "failing to use proper maintenance techniques and procedures" and for "making several fraudulent entries in his maintenance log." Furthermore, plaintiffs assert that, since 1953, Mr. Stroupe has had a long history of problems as a mechanic and that the F.A.A. has had knowledge of these problems.

In September, 1987, the plane in which Smith and Laske were killed was overhauled by Mr. Stroupe, and on October 1, 1987, Mr. Stroupe issued a certificate of airworthiness for the plane.

On October 2, 1987, the F.A.A., based on the conduct stated in the August 3, 1987 citation, "revoked on an emergency basis" Mr. Stroupe's certification as an airplane mechanic.

Plaintiffs assert that defendant breached its duty owed to the decedents in two ways. First, the F.A.A. breached its duty owed to Smith and Laske by failing to

revoke Mr. Stroupe's mechanic's certification on August 3, 1987, the date on which it had actual knowledge of his maintenance violations. Second, the F.A.A. breached its duty owed to Smith and Laske when it failed to notify the owner of the plane that, on October 2, 1987, Mr. Stroupe's mechanic's certification had been revoked, and that the plane may not be airworthy as certified by Mr. Stroupe on October 1, 1987.

Dismissal for Lack of Subject-Matter Jurisdiction

In its motion to dismiss, defendant states that plaintiffs' complaint should be dismissed, pursuant to F.R.C.P. Rule 12(b)(1), for lack of subject-matter jurisdiction. In its brief in support of its motion to dismiss, defendant, however, does not argue for dismissal under Rule 12(b)(1). Furthermore, the court notes that it has jurisdiction over the suit pursuant to 28 U.S.C. S 1346(b). Therefore, the court DENIES defendant's motion to dismiss for lack of subject-matter jurisdiction.

Dismissal for Failure to State A Claim

In a motion to dismiss, the court

must accept the plaintiffs' allegations as true. Furthermore, the movant has the burden to show "clearly that no relief could be granted [to the plaintiffs] under any set of facts." Conley v. Gibson, 355 U.S. 41, 46, 78 S.Ct. 99 (1957).

Under the F.T.C.A., the United States partially waives its sovereign immunity and consents to be sued for certain common law torts. 28 U.S.C. § 1346(b), confers jurisdiction on the federal courts for F.T.C.A. suits and provides in pertinent part

> The district courts shall have exclusive jurisdiction of civil actions on claims against the United States...for personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person. would be liable to the claimant in accordance with the law of the place where the act or omission occurred. (emphasis supplied by court)

In Sellfors v. United States, 697 F.2d 1362, 1367 (11th. Cir. 1983), the quoting

with approval from Zabala Clemente v. United States, 567 F.2d 1140 (1st Cir. 1970), the court held

> even where the specific behavior of federal employees is required by statute, liability to the beneficiaries of that statute may not be founded on the Federal Tort Claims Act if state law recognizes no comparable private liability.

In other words, plaintiffs must show that a private person would be liable under applicable state law for the alleged acts or omissions perpetrated by the government employee.

Under the Federal Tort Claims Act, in cases where the alleged negligence occurred in one state but the injury resulted in a different state, courts borrow the tort law of the state in which the negligent acts or omissions occurred. See Richards v. United States, 369 U.S. 1, 82 5. Ct. 585 (1962) and Foster v. United States, 768 F.2d 1278 (11th Cir. 1985). In its motion to dismiss, defendant states that the substantive tort law of Georgia applies in the instant case because "the alleged governmental negligence occurred in

Georgia." Plaintiffs apparently agree with defendant. The court notes that it does not matter whether the alleged negligence occurred in Georgia or North Carolina because the substantive tort law in both states is essentially the same.

Under Georgia law, in order to maintain an action in tort, defendant must have breached a duty owed to plaintiffs. See Stone Mountain Game Ranch. Inc. v. Hunt, 746 F.2d 761, 766 (11th Cir. 1984).

In their brief in opposition to defendant's motion to dismiss, plaintiffs state that defendant owed plaintiffs a duty under the good samaritan doctrine. That doctrine has four elements: (1) an undertaking to render services; (2) the services are to be rendered to another; (3) the person undertaking the services should recognize that those services are necessary for the protection of a third party; and (4) the undertaking either increases the risk of harm or the harm was suffered because of reliance by the third person upon the undertaking. See Huggins v. Aetna Casualty and Surety Company, 245 Ga. 248, 264 S.E.2d 191 (1980).

In Sellfors v. United States, 697 F.2d 1362 (11th Cir. 1983), the court held that under Georgia law, "where one does not

create the dangerous situation and takes no remedial measures, he is not liable [under the Good Samaritan Doctrine]." In addition, the court held that to establish liability under the Georgia good samaritan doctrine, there must be "actual reliance" by the decedents on the undertaking.

In Howell v. United States, Civil Action No. 1:88-cv-1930- RCF (N.D. Ga. December 11, 1989), plaintiffs sought recovery against the United States pursuant to the F.T.C.A. because an F.A.A. inspector had failed to "ground a plane" which the inspector knew contained contaminated fuel. The court found that the inspector had not been responsible for the fuel contamination, and, therefore, he had not created the hazardous situation. Relying on Sellfors and Zabala Clemente, the court found that the inspector had no duty under the Georgia good samaritan doctrine to take remedial measures. The court finds that plaintiffs have failed to establish the existence of a duty under the Georgia good samaritan doctrine. The court finds that plaintiffs have not and cannot show that the F.A.A.'s "undertaking" to certify the mechanic was for their benefit. Moreover, in their brief,

plaintiffs assert that Mr. Stroupe negligently inspected the plane. The court finds that, under the facts argued by plaintiffs, defendant did not create the hazardous situation, and, therefore, defendant cannot be liable for failing to take remedial measures. Finally, plaintiffs have failed to present any factual support for their conclusion that the decedents "actually relied" on the F.A.A. inspection. For the foregoing reasons, the court GRANTS plaintiffs' motion to dismiss for failure to state a claim upon which relief can be granted.

Summary

(1) The court DENIES defendant's motion to dismiss for lack of subject matter jurisdiction, and

(2) the court GRANTS defendant's motion to dismiss for failure to state a claim upon which relief can be granted.

SO ORDERED, this 28th day of September, 1990.

/s/ G. Ernest Tidwell
Judge
U. S. District Court

JUDGMENT ON DECISION BY THE COURT

UNITED STATES DISTRICT COURT
For the Northern District of Georgia
Newnan Division

JO A. SMITH, Individually and as Administratrix of the Estate of David Allen Smith, et al.

Plaintiffs

vs. JUDGMENT

UNITED STATES OF AMERICA

Defendant.

Civil Action Docket No. 3:89-cv-147
GET

This action came on for consideration before the court, United States District Judge, Hon. G. Ernest Tidwell presiding. The issues having been duly considered and a decision having been duly rendered, granting defendant's motion to dismiss for plaintiffs' failure to state a claim upon which relief can be granted.

IT IS ORDERED AND ADJUDGED that the plaintiffs, JO A. SMITH, Individually and as Administratrix of the Estate of David Allen Smith; JIMMIE A. SMITH, KATHLEEN A. AYERS, Individually and as Administratrix

of the Estate of Kelly Jean Laske, take nothing, that the action be dismissed and that the defendant, UNITED STATES OF AMERICA, recover costs of action. ****

FILED AND ENTERED IN THE CLERK'S OFFICE
October 2, 1990
LUTHER D. THOMAS, CLERK

BY: /s/ Danny Brown
Deputy Clerk

Dated at: Newnan, Georgia

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 90-9019

D.C. Docket No. 3:89-cv-147-GET

JO A SMITH, Individually, and as Administratrix of the Estate of David Allen Smith, and JIMMIE A. SMITH, and KATHLEEN A. AYERS, Individually and as Administratrix of the Estate of the KELLY JEAN LASKE,

Plaintiffs - Appellants,

versus

UNITED STATES OF AMERICA,

Defendant - Appellee.

APPEAL from the United States District Court for the Northern District of Georgia

---

(August 15, 1991)

Before JOHNSON and EDMONDSON, Circuit Judges, and DYER, Senior Circuit Judge

PER CURIAM:

AFFIRMED. See 11th Cir. R. 36-1.

"Costs taxes against plaintiffs-appellants."

Judgment Entered: August 15, 1991

For the Court: Miguel J. Cortez, Clerk
By: /s/ Karleen McNabb
Deputy Clerk

ISSUED AS MANDATE: October 25, 1991

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-9019

JO A SMITH, Individually, and as Administratrix of the Estate of David Allen Smith, and JIMMIE A. SMITH, and KATHLEEN A. AYERS, Individually and as Administratrix of the Estate of the KELLY JEAN LASKE,

Plaintiffs - Appellants,

versus

UNITED STATES OF AMERICA,

Defendant - Appellee.

On Appeal from the United States District Court for the Northern District of Georgia

---

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion August 15, 1991, 11th Cir., 19__, F.2d ___).

Before: JOHNSON and EDMONDSON, Circuit Judge, and DYER, Senior Circuit Judge

PER CURIAM:

(x) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 25,

Federal Rules of Appellate Procedure; Eleventh Circuit Rule 25-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Frank M. Johnson

United States Circuit Judge

Filed U. S. COURT OF APPEALS
ELEVENTH CIRCUIT
OCTOBER 17, 1991
MICHAEL J. CORTEZ, CLERK

49 U.S.C. § 1301

§ 1301. Definitions

. . .

(7) "Airman" means any individual who engages, as the person in command or as pilot, mechanic, or member of the crew, in the navigation of aircraft while under way; and (except to the extent the Secretary of Transportation may otherwise provide with respect to individuals employed outside the United States) any individual who is directly in charge of the inspection, maintenance, overhauling, or repair of aircraft, aircraft engines, propellers, or appliances; and any individual who serves in the capacity of aircraft dispatcher or air-traffic control-tower operator.

§ 1302. Consideration of matters in public interest by Board.

(a) Factors for interstate, overseas, and foreign air transportation

In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(1) The assignment and maintenance of safety as the highest priority in air commerce, and prior to the authorization of new air transportation services, full evaluation of the recommendations of the Secretary of Transportation on the safety implications of such new services and full evaluation of any report or recommendation submitted under section 1307 of this title.

(2) The prevention of any deterioration in established safety procedures, recognizing the clear intent, encouragement, and dedication of the Congress to the furtherance of the highest degree of safety in air transportation and air commerce, and the maintenance of the safety vigilance that has evolved within air transportation and air commerce and has come to be expected by the traveling and shipping public.

§1305. Federal preemption

(a) Preemption

(1) Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

(2) Except with respect to air transportation (other than charter air transportation) provided pursuant to a certificate issued by the Board under section 1371 of this title, the provisions of paragraph (1) of this subsection shall not apply to any transportation by air of persons, property, or mail conducted wholly within the State of Alaska.

49 U.S.C. app. § 1421

§ 1421. Powers and duties of Secretary of Transportation

(a) Minimum standards; rules and regulations

The Secretary of Transportation is empowered and it shall be his duty to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time:

(1) Such minimum standards governing the design, materials, workmanship, construction, and performance of aircraft, aircraft engines, and propellers as may be required in the interest of safety;

(2) Such minimum standards governing appliances as may be required in the interest of safety;

(3) Reasonable rules and regulations and minimum standards governing, in the interest of safety, (A) the inspection, servicing, and overhaul of aircraft, aircraft engines, propellers, and appliances; (B) the equipment and facilities for such inspection, servicing, and overhaul; and (C) in the discretion of the Secretary of Transportation, the periods for, and the manner in, which such inspection, servicing, and overhaul shall be made, including provision for examinations and reports by properly qualified private persons whose examinations or reports the Secretary of Transportation may accept in lieu of those made by its officers and employees; . . .

FAA INVESTIGATIVE AND ENFORCEMENT PROCEDURES

14 C.F.R. § 13.19 (1988)

§13.19. Certificate action

(a) Under section 609 of the Federal Aviation Act of 1958 (49 U.S.C. 1429), the Administrator may reinspect any civil aircraft, aircraft engine,, propeller, appliance, and navigation facility, or air agency, and may re-examine any civil airman. Under section 501(e) of the FA Act, any Certificate of Aircraft Registration may be suspended or revoked by the Administrator for any cause that renders the aircraft ineligible for registration.

(b) If, as a result of such a reinspection, re-examination, or other investigation made by the Administrator under section 609 of the FA Act, the Administrator determines that the public interest and safety in air commerce requires it, the Administrator may issue an order amending, suspending, or revoking, all or part of any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate, or air agency certificate. This authority may be exercised for remedial purposes in cases involving the Hazardous Materials Transportation Act (49 U.S.C. 1801 et seq.) or regulations issued under that Act. This authority is also exercised by the Chief Counsel, the Assistant Chief Counsel for Regulations and Enforcement, and the

Regional Counsel concerned. If the Administrator finds that any aircraft registered under Part 47 of this chapter is ineligible for registration or if the holder of a Certificate of Aircraft Registration has refused or failed to submit AC Form 8050-73, as required by §47.51 of this chapter, the Administrator issues an order suspending or revoking that certificate. This authority as to aircraft found ineligible for registration is also exercised by the Aeronautical Center Counsel.

(c) Before issuing an order under paragraph (b) of this section, the Chief Counsel, the Assistant Chief Counsel for Regulations and Enforcement, the Regional Counsel concerned, or the Aeronautical Center Counsel (as to matters under Title V of the FA Act) advises the certificate holder of the charges or other reasons upon which the Administrator bases the proposed action and, except in an emergency, allows the holder to answer any charges and to be heard as to why the certificate should not be amended, suspended, or revoked. The holder may, by checking the appropriate box on the form that is sent to the holder with the notice of proposed certificate action, elect to –

(1) Admit the charges and surrender his or her certificate;

(2) Answer the charges in writing;

(3) Request that an order be issued in accordance with the notice of proposed certificate action so that the certificate holder may appeal to the National Transportation Safety Board, if the charges concerning a matter under Title VI of the FAAct;

(4) Request an opportunity to be heard in an

informal conference with the FAA counsel: or

(5) Request a hearing in accordance with Subpart D of this part if the charges concern a matter under Title V of the FA Act.

Except as provided in §13.35(b), unless the certificate holder returns the form and, where required, an answer or motion, with a postmark of not later than 15 days after the date of receipt of the notice, the order of the Administrator is issued as proposed. If the certificate holder has requested an informal conference with the FAA counsel and the charges concern a matter under Title V of the FAAct, the holder may after that conference also request a formal hearing in writing with a postmark of not later than 10 days after the close of the conference. After considering any information submitted by the certificate holder, the Chief Counsel, the Assistant Chief Counsel for Regulations and Enforcement, the Regional Counsel concerned, or the Aeronautical Center Counsel (as to matters under Title V of the FA Act) issues the order of the Administrator, except that if the holder has made a valid request for a formal hearing on a matter under Title V of the FA Act initially or after an informal conference, Subpart D of this part governs further proceedings.

(d) Any person whose certificate is affected by an order issued under this section may appeal to the National Transportation Safety Board. If the certificate holder files an appeal with the Board, the Administrator's order is stayed unless the Administrator advises the Board that an emergency exists and safety in

air commerce requires that the order become effective immediately. If the Board is so advised, the order remains effective and the Board shall finally dispose of the appeal within 60 days after the date of the advice. This paragraph does not apply to any person whose Certificate of Aircraft Registration is affected by an order issued under this section.

FAA MAINTENANCE, PREVENTIVE MAINTENANCE, REBUILDING, AND ALTERATION REGULATIONS

14 C.F.R. § 43.5 (1988)

§43.5 Approval for return to service after maintenance, preventive maintenance, rebuilding, or alteration.

No person may approve for return to service any aircraft, airframe, aircraft engine, propeller, or appliance, that has undergone maintenance, preventive maintenance, rebuilding, or alteration unless –

(a) The maintenance record entry required by § 43.9 or § 43.11, as appropriate, has been made;

(b) The repair or alteration form authorized by or furnished by the Administrator has been executed in a manner prescribed by the Administrator; and

(c) If a repair or an alteration results in any change in the aircraft operating limitations or flight data contained in the approved aircraft flight manual, those operating limitations or flight data are appropriately revised and set forth as prescribed in § 91.31 of this chapter.

FAA MAINTENANCE, PREVENTIVE MAINTENANCE, REBUILDING, AND ALTERATION REGULATIONS

14 C.F.R. § 43.7 (1988)

§43.7 Persons authorized to approve aircraft, airframes, aircraft engines, propellers, appliances. or component parts for return to service after maintenance, preventive maintenance, rebuilding, or alteration.

(a) Except as provided in this section and § 43.17, no person, other than the Administrator, may approve an aircraft, airframe, aircraft engine, propeller, appliance, or component part for return to service after it has undergone maintenance, preventive maintenance, rebuilding, or alteration.

(b) The holder of a mechanic certificate or an inspection authorization may approve an aircraft, airframe, aircraft engine, propeller, appliance, or component part for return to service as provided in Part 65 of this chapter.

FAA GENERAL OPERATING AND FLIGHT RULES

14 C.F.R. § 91.29 (1988)

§91.29 Civil aircraft airworthiness.

(a) No person may operate a civil aircraft unless it is in an airworthy condition.

(b) The pilot in command of a civil aircraft is responsible for determining whether that aircraft is in condition for safe flight. He shall discontinue the flight when unairworthy mechanical or structural conditions occur.

ORDER 2150.3, CHAPTER 2
COMPLIANCE AND ENFORCEMENT PROGRAM, DOT/FAA, MAY 16, 1980

200. PURPOSE. The purpose of this chapter is to set forth the policies and objectives of the Federal Aviation Administration as established by this order and by policy statements or directives issued by the Administrator.

201. GENERAL. The FAA is charged with the responsibility to assure that the highest possible degree of safety in air transportation and air commerce is maintained. To achieve this, the agency first must establish regulatory standards and requirements.

a. Once the regulations are in effect, to assure effective implementation the agency must provide for the education and guidance needed by the industry and the public. The importance of this step, and the related personal and organizational skills needed, cannot be overemphasized. In the absence of thorough understanding, compliance with safety regulations cannot be achieved.

b. Finally, the agency has a statutory obligation to assure compliance with all regulations. This obligation is especially critical as it applies to the holders of FAA certificates. Individual inspectors, managers, and attorneys must clearly understand the crucial role they play in achieving compliance. However, providing

guidance and training to industry, as crucial as that role is, must be kept in proper perspective. Once a certificate or an amendment involving that certificate is issued, the holder (individual, operator, manufacturer, supplier, etc.) must be held responsible for compliance. This may best be looked on as a total enforcement concept. As an example, the responsible field office should respond as forcefully, through investigation, reporting, and follow-up, to an airport certificate holder who fails to comply with firefighting equipment requirements, as another field office will respond to an aircraft manufacturer's use of materials that do not conform to specifications in a type design; or still another field office will respond to the operation of an aircraft over congested areas below minimum safe altitudes. The Administrator's enforcement policy does not vary by internal agency discipline. Each certification and operating rule is important in achieving overall safety objectives. The FAA enforcement program described in this handbook is equally applicable to all activities regulated by the agency, including programs which may have traditionally used different methods of obtaining compliance. When violations occur, whether they involve the operation of an airport, the production of aircraft, the performance of aircraft maintenance, or the operation of aircraft, FAA personnel responsible for enforcing those regulations shall investigate, report, and process such matters for appropriate enforcement action consistent with this order.

a. Federal Aviation Act of 1958. The Federal Aviation Act of 1958 places a duty on the Administrator

to prescribe reasonable rules, regulations, orders, and minimum standards in the public interest. Once a regulation is issued, it is expected there will be compliance with all requirements contained in the regulation. A violation of any regulation must be responded to with an effective enforcement program.

b. Airline Deregulation Act of 1978. Section 107 of the Act states that Congress intends that the Act's implementation result in no diminution of the high standard of safety in air transportation attained in the United States.

203. ENFORCEMENT PROGRAM. The objectives of the enforcement program as set forth in Order 1000.9C, Enforcement Policy, are achieved through surveillance and detection, investigation, and enforcement processing.

a. Surveillance and Detection. An essential part of the enforcement program is that violations and potential violations be discovered at the earliest possible time. In any situation where inspectors identify a potential violation, they should act to prevent it. For example, an airworthiness inspector who finds an air carrier aircraft, about to be used in air transportation, that is not in condition for safe operation shall notify the air carrier of that condition in accordance with the provisions of Section 605(b) of the FA Act (see Figure 2-1, Sample Notice of Aircraft Condition). Every alleged violation must be identified, reported, and processed in an appropriate manner. Any agency employee who becomes aware of apparent violations shall report such

violations to responsible agency elements and shall cooperate with subsequent investigations. Consistent with the agency's statutory mandate contained in the FA Act and the Airline Deregulation Act, there must be a particularly high level of surveillance of commercial air transportation operations. In addition, special attention must be given to commuter and air taxi operator compliance.

b. Investigation. Prompt action is essential to assure a fair enforcement program. Unnecessary delays in the investigation cannot be tolerated. Every effort must be made to expeditously investigate and report violations. The responsibility to act promptly rests equally upon the inspector investigating the incident as well as the regional and Washington offices responsible for enforcement action. Delays in processing violation reports weaken the effectiveness of the agency's enforcement program in several ways. First, such delays may permit an unsafe condition to prevail if prompt corrective action is not taken. Secondly, delays tend to deemphasize the seriousness of a given violation. In this manner, prolonged delays tend to strengthen the violator's case. By the same token, if the alleged violator is innocent, any unwarranted delay in processing the case may impose an unjustified hardship. In order that enforcement actions be objective and fair, there must an unbiased gathering of all facts, precise investigation, and accurate and prompt reporting. A violation report without all of the facts only leads to delays and thus, the objective of fair enforcement is lost. Such reports can also mislead reviewing authorities and

result in embarrassment for the agency. Poor investigation weakens the effectiveness of the enforcement program. It is important that the investigation be planned and conducted in a manner consistent with the complexities involved. For example, routine investigation of a low-flight incident may only require interviews of witnesses to the violation. On the other hand, allegations involving an aircraft manufacturer's failure to properly maintain a quality control system during the production of aircraft may require careful investigatory planning, early coordination with legal counsel, subpoena of documents, and other use of the Administrator's authority under Section 1004 of the FA Act. As part of the investigation, all special and mitigating circumstances associated with the violation, as well as information which tends to undermine an allegation, should be contained in the report. An inspector who is not attentive to special mitigating circumstances may only provoke resentment, making it more difficult to obtain compliance and cooperation in the future from all parties, including witnesses. See Chapter 4 for guidance in planning and conducting investigations.

c. Enforcement Processing. When violations occur, firm action must be taken. A vigorous enforcement policy is necessary to achieve compliance with the regulations and we must forcefully respond to violations. Firmness should be balanced with fairness.

(1) Policy. Compliance with the regulations is promoted through both administrative and

formal legal actions. Administrative actions (warning letters or letters of correction) are utilized to check potentially unsafe practices in situations where formal actions are unnecessary or inappropriate. Formal legal actions are undertaken to:

(a) Enjoin conduct, before the act, which would violate the regulation (e.g., cease and desist orders, injunctions, aircraft seizures);

(b) Impose punitive sanctions, after the act, to deter violations (e.g., certificate actions, civil penalties);

(c) Achieve remedial purposes (e.g., certificate suspension pending demonstration of qualifications; revocation for lack of certificate qualifications).

(2) Judgement in Selecting Appropriate Action. It is difficult, solely by order, to establish guidelines which will correctly categorize all regulatory infractions so as to pin point the appropriate enforcement action. The ultimate decision must be the product of judgement and experience applied to the facts and circumstances of the individual case. Inspectors and field office chiefs must continue to exercise good judgement in handling first offense violations which meet the criteria for administrative action and can be so handled with dispatch. If, however, the violation does not fit that criteria or there is deceit or incompetence involved, take strong action. Use the maximum sanctions

appropriate. If monetary sanction against any certificate holder is insufficient to get and keep their attention, do not hesitate to use certificate action. Enforcement and investigative personnel can expect that their diligent efforts will be given full support at all levels of the FAA.

(3) National Uniformity. Each region must make every effort to achieve uniformity of enforcement action. Similar violations under similar circumstances should result in the same type of enforcement action and sanction. The geographical concept of enforcement will aid the regions in achieving this goal on all violations, regardless of the violators domicile. However, all personnel must remain alert to actions which have been taken on similar violations in other regions as well as within their own region, to achieve the overall goal of national uniformity. To assist in this effort, information regarding enforcement actions, including program areas requiring emphasis, will be the subject of compliance/enforcement bulletins when the need is identified.

204. ADMINISTRATIVE ACTION. Administrative enforcement action may be taken in lieu of legal enforcement action only when ALL of the following elements are present:

a. No significant unsafe condition existed;

b. Lack of competency or qualification was not involved;

c. The violation was not deliberate; and

d. The alleged violator has a constructive attitude toward complying with the regulations, and has not been involved in previous similar violations.

205. DETERMINING THE TYPE OF LEGAL ENFORCEMENT ACTION. It is the inspector's responsibility to initially recommend the appropriate enforcement action. All involved elements of the FAA are then responsible for evaluating the seriousness of a violation, defining its impact on safety, and judging the necessary action to obtain compliance. It is the intent of the following guidelines to assure greater national uniformity in enforcement actions.

a. Civil penalty.

(1) Civil penalty action is normally used as the sanction in cases where the violator does not hold any current certificates, in cases where a violator holds a certificate but no question of qualification is involved, or where the facts or circumstances are too serious to handle by administrative type enforcement action. Civil penalty action may also be used in lieu of certificate action where a suspension is not necessary to obtain immediate corrective action. For example, where a major air carrier is involved in a maintainance violation and has taken satisfactory corrective action, a substantial civil penalty will serve as an appropriate deterent without disrupting essential air service to the public. Civil penalities also may be initiated in any case where normally a suspension would be manifestly unfair or

create an undue hardship and is not required for aviation safety. However, when there is a serious ongoing safety violation involved, and immediate corrective action cannot be obtained, certificate action should be considered notwithstanding hardship to the certificate holder or disruption of public service.

(2) Civil penalty action will not normally be used as an additional sanction to certificate action. It should not be used as a substitute for certificate or restraining action when competence, attitude, or other circumstances are such that the same or similar violation is likely to occur.

b. Certificate action - suspension.

(1) Suspension action should be considered in all cases where safety requires it. For example, it should be utilized against an aircraft component manufacturer involved in serious quality control violations, whose product must be prevented from entering into service until adequate corrective actions are completed.

(2) It should be used in all cases where technical proficiency or qualification warrants, as in the case of an unqualified mechanic.

(3) Suspension action is warranted in situations where a certificate holder resists reexamination or reinspection under Section 609 of the Federal Aviation Act, or the reexamination or reinspection is not

satisfactorily accomplished within a reasonable length of time (see Chapter 8).

(4) Suspension may be used for punitive purposes where the nature of the violation warrants it, except in cases where over six months have elapsed since the date of alleged violation. (See 49 CFR 821.33, NTSB Rules of Practice). The withdrawal of the privileges of certificate is a natural, equitable, and just consequence of the abuse of such privileges.

c. Certificate action - revocation.

(1) Revocation of a certificate or a rating should be sought in all cases where there is lack of capability or other deficiency incapable of immediate correction; in cases where the certificate holder has demonstrated by repeated offenses an unwillingness or inability to comply with the principles of air safety; and in cases where the continued exercise by the individual of the privileges of the certificate would be detrimental to the public interest. For example, revocation should be sought in cases where an aircraft is used for smuggling or transporting narcotics, or where there is falsification of records.

(2) In cases involving organizations, revocation should be sought where their conduct demonstrates a lack of qualification; i.e., deliberate and flagrant violations; falsification of records.

d. Other recommended action. In addition to

the recommendation for legal enforcement action, the field office should determine the possible need for any additional or special enforcement action and, when appropriate, submit such recommendations to the regional office. This may include recommendations for:

(1) Emergency suspension or revocation of certificates.

(a) Emergency action in suspending or revoking a certificate or manufacturing approval should be taken ONLY when it is clearly needed in the public interest and must be taken immediately when the need for such action is recognized. The emergency authority will not be used for punitive reasons. Evidence for such action must show a lack of qualification or that the certificate holder likely will continue exercising the privileges of the certificate.

(b) The following are examples of when emergency action might be appropriate:

1 When the holder of a pilot certificate has deliberately engaged in reckless or dangerous flying.

2 Where an airport operator has no firefighting or rescue equipment and service capability due to a labor strike.

3 When the holder of an airman medical continues to operate as pilot-in-command

of aircraft after having been informed by the FAA that he or she no longer qualifies for the medical certificate.

4 When the holder of a production certificate fails to maintain its approved quality control system, and continues to submit non-conforming or unsafe products for airworthiness certification or approval.

5 When the holder of a repair station certificate returns unairworthy aircraft to service, and it is determined that they do not have an inspection system that will produce satisfactory quality control.

(2) Seizure of Aircraft. Under certain conditions described in paragraph 1205a, when an aircraft is involved in a violation of the Federal Aviation Regulations and the violation is by the aircraft owner or person in command, the aircraft may be summarily seized. A "person in command," as used in this context, is interpreted to be any person who causes or authorizes the operation of an aircraft, whether with or without the right of legal control of the aircraft, including the pilot in command. Seizure action, when appropriate, may be recommended regardless of the status of the investigation or legal processing of any prior violation(s).

(3) Cease and desist orders, orders of compliance, and injunctions. Whenever the inspector determines that a condition requiring immediate action exists, in respect of safety in air commerce, the field

office should bring the matter to the attention of the regional office to consider the appropriateness of issuing a cease and desist order, an order of compliance, or initiating action in U.S. district court for injunctive relief. (See paragraphs 1206, 1207, 1209, 1210 and 1211.)

(4) Criminal prosecution. If the inspector's investigation discloses any evidence of willful conduct which could constitute violations of any criminal provisions of the Federal Aviation Act of 1958, the Hazardous Materials Transportation Act, or of any other Federal criminal statute of which he is aware, the field office should bring such information to the attention of the regional office (see Chapter 6).

(5) Procedure. When it is determined that emergency suspension or revocation, aircraft seizure, order of compliance, cease and desist order or injunction action, or criminal prosecution is appropriate, the field office shall immediately inform the regional office of the facts and circumstances. In support of these recommendations, the inspector must complete and process the Enforcement Investigative Report as expeditiously as possible.

[Spelling and grammatical errors in the original].

2A J. MOORE, W. TAGGART & J. WICKER, MOORE'S CIVIL PRACTICE, ¶ 1207 [2.-5] (2d ed. 1985)

[2.-5] - Failure to state a claim upon which relief can be granted.

A motion to dismiss for failure to state a claim upon which relief can be granted performs substantially the same function as the old common-law demurrer. A dismissal under this provision is on the merits and is accorded res judicata effect. For this reason, dismissal under subdivision (b)(6) is generally disfavored by the courts.

The burden of demonstrating that no claim has been stated is upon the movant. In determining the motion, the court must presume all factual allegations of the complaint to be true and all reasonable inferences are made in favor of the non-moving party. However, legal conclusions, deductions or opinions couched as factual allegations are not given a presumption of truthfulness.

Generally, the allegations of a complaint are to be liberally construed. This is especially true when the complaint is made pro se.

After thus construing the complaint, the court should deny a motion to dismiss for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." In Scheuer v. Rhodes, the

Supreme Court stated:

> When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter of for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.

In making this determination, the likelihood that plaintiff will prevail is immaterial, as is the fact that the requested relief is inappropriate, or the legal theories have been miscategorized.

The court may not consider any material other than the pleadings in determining a motion under subdivision (b)(6) unless it converts the motion into a motion for summary judgment under Rule 56.

However, material which is submitted as part of the complaint, as well as certain items in the record and the public record, may be considered by the court.

Dismissal is proper if the complaint lacks an allegation regarding a required element necessary to obtain relief, or if the plaintiff fails to properly allege standing. A motion under Rule 12(b)(6) should also be granted if an affirmative defense or other bar to relief is apparent from the face of the complaint, such as the official immunity of a defendant, or the statute of limitations. Lack of capacity to be sued may also be raised by a Rule 12(b)(6) motion.

Related to Rule 12(b)(6) is 28 USC § 1915(d), which permits the court to dismiss an application by a plaintiff to proceed in forma pauperis if the action is frivolous or malicious. Some courts have held that this provision is broader than Rule 12(b)(6) and permits dismissals of actions which might withstand a motion under the Rule. For example, in Jones v. Bales the court held that an action could be dismissed as frivolous under § 1915(d) if "plaintiff's realistic chances of ultimate success are slight." The prevailing view, however, has regarded the standard for dismissal under § 1915(d) as being essentially identical to that under Rule 12(b)(6), in light of the lenient treatment accorded pro se complaints generally. Unlike dismissals under 28 USC § 1915(d), dismissals under Rule 12(b)(6) should ordinarily not be made ex parte, although the court may order dismissal on its own motion if process has been issued and served and plaintiff is given notice and an opportunity to respond.

If a motion under Rule 12(b)(6) is granted, ordinarily an opportunity to amend should be fully granted if the

deficiencies in the complaint can be corrected by amendment.

[All Footnotes omitted]

RESTATEMENT (SECOND) OF TORTS §319 (1964)

§319. Duty of Those in Charge of Person Having Dangerous Propensities

One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

RESTATEMENT (SECOND) OF TORTS § 324(A) (1964)

§324A. Liability to third person for negligent performance of undertaking.

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

(a) his failure to exercise reasonable care increases the risk of such harm, or

(b) He has undertaken to perform a duty owed by the other to the third person, or

(c) The harm is suffered because of the reliance of the other or the third person upon the undertaking.